LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

July 2018

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UNITED STATES SUPREME COURT

CIVIL RIGHTS ACT CIVIL LIABILITY: OFFICER MAY LAWFULLY PREVENT PERSON FROM PRAYING AT PARTICULAR TIME AND PLACE, SUCH AS WHEN A SUSPECT UNDER ARREST SEEKS TO DELAY THE TRIP TO THE JAIL BY INSISTING ON FIRST ENGAGING IN CONDUCT THAT, AT ANOTHER TIME, WOULD BE PROTECTED BY THE FIRST AMENDMENT; BUT BOTH FIRST AMENDMENT FREEDOM OF RELIGION AND FOURTH AMENDMENT RIGHT OF LIBERTY MUST BE CONSIDERED; ACCORDINGLY, IN THIS CASE, MORE FACTS ARE NEEDED TO RESOLVE THE COMBINATION OF FIRST AMENDMENT AND FOURTH AMENDMENT ISSUES

Sause v. Bauer, ___ S.Ct. ___ , 2018 WL ___ (June 28, 2018)

Facts and Proceedings below: (Excerpted from U.S. Supreme Court opinion)

> Petitioner Mary Ann Sause, proceeding *pro se,* filed this action under Rev. Stat. 1979, 42 U.S.C. §1983, and named as defendants past and present members of the Louisburg, Kansas, police department, as well as the current mayor and a former mayor of the town. The centerpiece of her complaint was the allegation that two of the town's police officers visited her apartment in response to a noise complaint, gained admittance to her apartment, and then proceeded to engage in a course of strange and abusive conduct, before citing her for disorderly conduct and interfering with law enforcement.
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> Among other things, she alleged that at one point she knelt and began to pray but one of the officers ordered her to stop. She claimed that a third officer refused to investigate her complaint that she had been assaulted by residents of her apartment complex and had threatened to issue a citation if she reported this to another police department. In addition, she alleged that the police chief failed to follow up on a promise to investigate the officers' conduct and that the present and former mayors were aware of unlawful conduct by the town's police officers.

> [Sause's] complaint asserted a violation of her First Amendment right to the free exercise of religion and her Fourth Amendment right to be free of any unreasonable search or seizure. The [government] defendants moved to dismiss the complaint for failure to state a claim on which relief may be granted, arguing that the defendants were entitled to qualified immunity. [Sause] then moved to amend her complaint, but the District Court denied that motion and granted the motion to dismiss.
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> On appeal, [Sause], now represented by counsel, argued only that her free exercise rights were violated by the two officers who entered her home. The Court of Appeals for the Tenth Circuit affirmed the decision of the District Court, concluding that the officers were entitled to qualified immunity. 859 F.3d 1270 (2017). Chief Judge Tymkovich filed a concurring opinion. While agreeing with the majority regarding [Sause's] First Amendment claim, he noted that [Sause's] "allegations fit more neatly in the Fourth Amendment context." He also observed that if the allegations in the complaint are true, the conduct of the officers "should be condemned," and that if the allegations are untrue, [Sause] had "done the officers a grave injustice."

[Some citations omitted]

ISSUE AND RULING: When a person is arrested while engaged in conduct that in part involves purported free exercise of religion, are there both First Amendment freedom of religion and Fourth Amendment right to liberty questions that must be considered to determine if the arrest violates constitutional rights? (ANSWER BY SUPREME COURT: Yes, rules a unanimous Court)

Result: Reversal of 10th Circuit ruling that officers are entitled to qualified immunity; case remanded for hearings and fact-finding on the mix of First Amendment and Fourth Amendment questions in the case.

ANALYSIS: (Excerpted from Supreme Court opinion)

> The petition filed in this Court contends that the Court of Appeals erred in holding that the officers who visited petitioner's home are entitled to qualified immunity. The petition argues that it was clearly established that law enforcement agents violate a person''s right to the free exercise of religion if they interfere, without any legitimate law enforcement justification, when a person is at prayer. The petition further maintains that the absence of a prior case involving the unusual situation alleged to have occurred here does not justify qualified immunity.
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> There can be no doubt that the First Amendment protects the right to pray. Prayer unquestionably constitutes the "exercise" of religion. At the same time, there are clearly circumstances in which a police officer may lawfully prevent a person from praying at a particular time and place. For example, if an officer places a suspect under arrest and orders the suspect to enter a police vehicle for transportation to jail, the suspect does not have a right to delay that trip by insisting on first engaging in conduct that, at another time, would be protected by the First Amendment. When an officer's order to stop praying is alleged to have occurred during the course of investigative conduct that implicates Fourth Amendment rights, the First and Fourth Amendment issues may be inextricable.

That is the situation here. As the case comes before us, it is unclear whether the police officers were in [Sause's] apartment at the time in question based on her consent, whether they had some other ground consistent with the Fourth Amendment for entering and remaining there, or whether their entry or continued presence was unlawful. [Sause's] complaint contains no express allegations on these matters. Nor does her complaint state what, if anything, the officers wanted her to do at the time when she was allegedly told to stop praying. Without knowing the answers to these questions, it is impossible to analyze [Sause's] free exercise claim.

In considering the [government] defendants' motion to dismiss, the District Court was required to interpret the *pro se* complaint liberally, and when the complaint is read that way, it may be understood to state Fourth Amendment claims that could not properly be dismissed for failure to state a claim. We appreciate that [Sause] elected on appeal to raise only a First Amendment argument and not to pursue an independent Fourth Amendment claim, but under the circumstances, the First Amendment claim demanded consideration of the ground on which the officers were present in the apartment and the nature of any legitimate law enforcement interests that might have justified an order to stop praying at the specific time in question. Without considering these matters, neither the free exercise issue nor the officers' entitlement to qualified immunity can be resolved. Thus, [Sause's] choice to abandon her Fourth Amendment claim on appeal did not obviate the need to address these matters.

For these reasons, we grant the petition for a writ of certiorari; we reverse the judgment of the Tenth Circuit; and we remand the case for further proceedings consistent with this opinion.

HIGH COURT SCOLDS NINTH CIRCUIT PANEL FOR FAILURE TO ADHERE TO HABEAS REVIEW STANDARD IN NINTH CIRCUIT PANEL'S ERRONEOUS RULING THAT FAULTY POLICE EYEWITNESS IDENTIFICATION PROCEDURES WERE SO SUGGESTIVE AS TO MAKE IDENTIFICATION EVIDENCE UNRELIABLE AND REQUIRE REVERSAL OF MURDER CONVICTION

In Sexton v. Beudreaux, ___ S.Ct. ___ , 2018 WL ___ (June 28, 2017), the U.S. Supreme Court makes a summary decision (without oral argument) and reverses a Ninth Circuit decision that was made by an unpublished Ninth Circuit opinion that focused on police identification procedures in setting aside a California state court first degree murder conviction. The U.S. Supreme Court decision is highly critical of the Ninth Circuit panel for essentially ignoring two highly deferential review standards – (1) the habeas review standard that requires federal courts to give a great benefit of the doubt to state court rulings that a criminal defendant seeks to have the federal courts review; and (2) the review standard for appellate courts when assessing whether police identification processes violated constitutional Due Process requirements such that identification testimony should have been suppressed at trial to avoid unreliable evidence tainting a conviction. Defendant had argued in his habeas petition that his trial attorney failed to effectively defend him by not moving to suppress identification testimony.

In Sexton, the primary police identification procedure under attack was the police use of two photo lineups within a four-to-six-hour period, both of which lineups contained a picture of the defendant, though his picture was in a different position within the lineups. This is not best practice for conducting photo lineups and is improperly suggestive. But the Supreme Court concludes that in light of all of the evidence in the case, the state court could have reasonably

concluded that the identification testimony was reliable despite the improper nature of the photo identification procedure that included the defendant's picture in two photo lineups conducted close together in time.. A key part of the Supreme Court opinion explanation is as follows:

> True, [the eyewitness] gave a vague initial description of the shooter, . . . and there was a 17-month delay between the shooting and the identification . . . But, as the District Court found, [the eyewitness] had a good opportunity to view the shooter, having talked to [the defendant] immediately after the shooting. He also was paying attention during the crime and even remembered [defendant's] distinctive walk. . . . [The eyewitness] demonstrated a high overall level of certainty in his identification. He chose [defendant's] picture in both photo lineups, and he was "sure" about his identification once he saw [defendant] in person. There also was "little pressure" on [the eyewitness] to make a particular identification. . . . It would not have been "objectively unreasonable" to weigh the totality of these circumstances against [the defendant].

Result: Ninth Circuit decision granting habeas relief is reversed; case is remanded to the Ninth Circuit for further proceedings consistent with the U.S. Supreme Court decision.

Research Note: For discussion of law enforcement identification procedures, see the article, Eyewitness Identification Procedures: Legal and Practical Aspects, by your Legal Update Editor on the Criminal Justice Training Commission's LED internet page.

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NINTH CIRCUIT, UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT CIVIL LIABILITY: IN SEARCH FOR PAROLEE-AT-LARGE, NO QUALIFIED IMMUNITY FOR NON-EXIGENT, FORCED, WARRANTLESS ENTRY OF LAWFULLY OCCUPIED SHACK LOCATED WITHIN SEMI-ENCLOSED CURTILAGE OF THIRD PARTY'S HOME; WARRANTLESS ENTRY OF SHACK LED TO OFFICERS' SHOOTING OF OCCUPANTS, SUPPORTING – UNDER PROXIMATE CAUSE THEORY – PLAINTIFFS' CLAIMS AGAINST OFFICERS FOR THE SHOOTING; COURT DECLARES THAT SHACK HAD PRIVACY PROTECTION, AND COURT RULES AGAINST OFFICERS ON EXIGENT CIRCUMSTANCES, PROTECTIVE SWEEP, AND CONSENT

QUALIFIED IMMUNITY WAS GRANTED IN 2016 NINTH CIRCUIT DECISION ON KNOCK-AND-ANNOUNCE ISSUE, BUT GOING FORWARD, OFFICERS MUST KNOCK AND ANNOUNCE IF THEY REASONABLY SHOULD KNOW THAT AN AREA WITHIN THE CURTILAGE IS A SEPARATE RESIDENCE

In Mendez v. County of Los Angeles, ___ F.3d ___, 2018 WL ____ (9th Cir., July 27, 2018), a three-judge Ninth Circuit panel again rules against Los Angeles County deputy sheriffs after remand of the case by the United States Supreme Court following the Supreme Court's 2017 reversal of the three-judge panel's 2016 decision. The 2017 Supreme Court decision disapproved of the Ninth Circuit's "provocation doctrine" that would use an unlawful law enforcement entry of private premises to support an excessive force claim even if, after entry, law enforcement officers were attacked by an occupant in a manner that would reasonably justify responsive force by law enforcement up to and including deadly force.

Now, the three-judge Ninth Circuit panel has reinstated liability for law enforcement use of deadly force by concluding that the unlawful law enforcement entry was a proximate cause of the shooting of the plaintiffs. Below, I will summarize the three decisions in order of issuance.

2016 Ninth Circuit Opinion

Two deputies, during a warrantless raid on a house in 2010, shot a homeless couple living in an enclosed shack in the backyard, including a man who picked up a BB gun (allegedly only to move the BB gun off his bed) as officers forced entry into the shack without knocking and announcing their presence and purpose. In the Ninth Circuit's 2016 opinion, the three-judge panel determined:

- that the entry into the shack constituted a search under the Fourth Amendment because the shack was in the curtilage adjacent to the house;
- the warrantless entry violated the Fourth Amendment as the deputies could not show consent, exigent circumstances, or a lawful protective sweep.

The 2016 Ninth Circuit decision also held that the deputies' entry into the shack also violated the knock and announce rule, but that the law on knock-and-announce in these circumstances was not clearly established in 2010, so the deputies were entitled to qualified immunity on that claim, with an award of nominal damages on that claim overturned. Going forward, the court stated, officers must knock and announce their presence when they know or should reasonably know that an area within the curtilage of a home is a separate residence from the main house.

While the 2016 three-judge panel's opinion did not rule that the shooting in response to the occupant picking up a BB gun was excessive force, the panel upheld deadly force liability under what the Ninth Circuit labeled the "provocation doctrine." Under that former doctrine, when "an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, [the officer] may be held liable for [an] otherwise defensive use of deadly force." The Ninth Circuit's 2016 Opinion concluded that the unlawful entry was a provocation of the conduct of the occupant who picked up the BB gun (allegedly only to move the gun) upheld an award of $4 million for the shooting and $1 in nominal damages for the unlawful search.

2017 U.S. Supreme Court Decision Rejecting The Ninth Circuit's Provocation Doctrine

In County of Los Angeles v. Mendez, 137 S.Ct. 11539 (May 30, 2017), the U.S. Supreme Court ruled 8-0 in rejecting the "provocation doctrine" created by the Ninth Circuit of the U.S. Court of Appeals. The Ninth Circuit's rejected provocation doctrine would allow courts to hold law enforcement officers liable for an otherwise reasonable defensive use by officers of deadly force if the officers had earlier violated the constitution in some other way. In Mendez the earlier violation was the unlawful entry of the makeshift shack/residence. Under the Ninth Circuit approach, officers could be deemed to have thereby "provoked" the violent encounter by ending up, in simplistic terms, being in the wrong place at the wrong time.

The Supreme Court's Mendez opinion declared that officers cannot be held liable for excessive force under the Fourth Amendment solely due to an earlier "different Fourth Amendment violation." Such an earlier violation "cannot [automatically] transform a later, reasonable use of force into an unreasonable seizure."

The Fourth Amendment prohibits "unreasonable searches and seizures." The 2017 Supreme Court opinion declared that the problem with the provocation doctrine is that it instructs courts to look back in time to see if there was a different Fourth Amendment violation that is somehow tied to the eventual use of force. Under that approach, the separate earlier violation, rather than the forceful seizure itself, can be the sole basis of the plaintiff's excessive force claim. The Ninth Circuit's provocation approach mistakenly combines distinct Fourth Amendment claims rather than applying objective reasonableness analysis separately for each search or seizure that is alleged to be unconstitutional.

The U.S. Supreme Court remanded the case to the Ninth Circuit for further proceedings consistent with the U.S. Supreme Court ruling. The U.S. Supreme Court may not have seen the last of the Mendez case. The Supreme Court's 2017 Mendez opinion contained language that left room for the plaintiffs to argue on remand that the Fourth Amendment violation of warrantless entry of the shack was a "proximate cause" of the use of deadly force.

July 27, 2018 Ninth Circuit Decision Against The Deputies On Remand

On July 27, 2018, the three-judge Ninth Circuit panel rules again that: (1) that the entry into the shack constituted a search under the Fourth Amendment because the shack was in the curtilage adjacent to the house; and (2) the warrantless entry violated the Fourth Amendment as the deputies could not show consent, exigent circumstances or a lawful protective sweep.

The Ninth Circuit panel next rules that the officers' unjustified warrantless entry was the proximate cause of plaintiffs' injuries. The panel also holds that even if the Court were to treat the failure to get a warrant – rather than the entry – as the basis for the breach of legal duty, as the government defendants suggested, the panel would still reach the same conclusion regarding proximate cause. The panel rejects the government defendants' argument that Mendez's action of moving the gun so that it was pointed in their direction was a superseding cause of plaintiffs' injuries. The panel held that if an officer has a duty not to enter in part because he or she might misperceive a victim's innocent acts as a threat and respond with deadly force, then the victim's innocent acts cannot be a superseding cause of the use of deadly force.

Addressing plaintiffs' California negligence claim, the panel holds that plaintiffs prevail under the variation on the provocation doctrine under California negligence law approved in the California Supreme Court's decision in Hayes v. County of San Diego, 57 Cal. 4th 622, 639 (2013).

The panel concludes that the U.S. District Court judgment shall be amended to award all damages arising from the shooting in the plaintiffs' favor as proximately caused by the unconstitutional entry, and proximately caused by the failure to get a warrant. The panel further directs that judgment be entered in the plaintiffs' favor on the California negligence claim for the same damages arising out of the shooting.

LEGAL UPDATE EDITORIAL NOTE REGARDING KNOCK AND ANNOUNCE DOCTRINE:

In the Ninth Circuit three-judge panel's 2016 opinion, the panel made clear in the following passage that, in future cases involving law enforcement entry of shack residences in similar, separate-residence circumstances, the Ninth Circuit would not grant qualified immunity where officers failed to knock and announce:

> **To clearly establish the law going forward, . . . we hold that the deputies violated the Fourth Amendment when they failed to knock at the shack. We do not retreat from the general principle that "officers are not required to announce at [e]very place of entry" within a residence. . . . But we agree with the district court that the deputies here should have been aware that the shack in the backyard was being used as a separate residence. The deputies were told that a couple was living behind the house, and the shack itself was surrounded by an air conditioning unit, electric cord, water hose, and clothes locker. And parallel to the district court's reasoning that a knock should be required for a separate residence just as a warrant is, ... we hold that officers must knock and re-announce their presence when they know or should reasonably know that an area within the curtilage of a home is a separate residence from the main house.**
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> **This rule is supported by the purposes of the knock-and-announce rule, which is designed to protect our privacy and safety within our homes. . . . Indeed, here an announcement that police were entering the shack would almost certainly have ensured that Mendez was not holding his BB gun when the officers opened the door. Had this procedure been followed, the Mendezes would not have been shot.**

[Emphasis added]

CIVIL RIGHTS ACT CIVIL LIABILITY FOR DUE PROCESS VIOLATION: NO QUALIFIED IMMUNITY FOR OFFICERS FOR ALLEGED DELIBERATE INDIFFERENCE AND INCREASING OF THE DANGER TO PRO-TRUMP RALLY ATTENDEES BY SHEPHERDING THE ATTENDEES INTO A CROWD OF VIOLENT ANTI-TRUMP PROTESTERS

In Hernandez v. City of San Jose, ___ F.3d ___ , 2018 WL ___ (9th Cir., July 27, 2018), a three-judge Ninth Circuit panel affirms a California U.S. District Court's denial of qualified immunity to police officers in a Civil Rights Act lawsuit brought by attendees of a political rally for Donald Trump. The pro-Trump attendees were attacked by anti-Trump protesters as the rally attendees attempted to leave the rally.

The Ninth Circuit panel held that based on the allegations of the attendees, which the panel was required at this pre-trial, motion-to-dismiss stage of the proceedings, to take as true, the attendees alleged sufficiently: (1) that the officers increased the danger to them by shepherding them into a crowd of violent anti-Trump protesters, and (2) that the officers acted with deliberate indifference to that danger. The panel declares that qualified immunity must be denied to the officers because the case law was clear at the time of the officers' actions that the alleged actions of the officers, if believed, were done with indifference and violated the due process rights of the attendees not to be the victims of government-created danger.

The Hernandez Court describes the plaintiffs' factual allegations as follows:

> On June 2, 2016, Trump held a political rally ("Rally") at the McEnery Convention Center ("Convention Center") in San Jose, California. The San Jose Police Department ("Police Department"), along with the U.S. Secret Service, expected between 12,000 and 15,000 people to attend, and the event was to run from 7:00 p.m. to 8:30 p.m.
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> The Police Department was aware that Trump rallies in other cities had "spurred violent anti-Trump protests," and it took several steps to prepare for the Rally. Among other things, the City "requested between [50] and [70] additional officers" through "designated

mutual aid . . . channels to staff the Rally," accepted "additional officers and vehicle support" from other police departments in the area, and fitted many of the officers with riot gear. About 250 officers patrolled the Rally on June 2, 2016.

According to the First Amended Complaint ("FAC"), the City "normal[ly] [implements a] 'zero tolerance' approach to violent protesters[] by making targeted arrests during the protests." But here, the City took an "entirely different" approach: "the City Defendants instructed all officers to stand by, watch as the attacks occurred, and not intervene" because "intervention might cause a riot." The Attendees claim the Officers looked on as they were "battered by several anti-Trump protesters, including, in some instances, being struck in the head and face, kicked in the back, spat upon, and otherwise harassed and assaulted."

Significant to this appeal, the Attendees allege the Officers "[d]irect[ed] [them] into the [m]ob of [v]iolent [p]rotesters" waiting outside the Convention Center. As part of their crowd-control plan, the Officers only allowed the Attendees to "leave from the east-northeast exit of the . . . Convention Center" and "actively prevented [them] from leaving through alternative exits." "Upon exiting the [C]onvention [C]enter, the [A]ttendees were met with a police skirmish line, composed of and/or controlled by the [Officers]." "The [O]fficers in this line required the [Attendees] to turn north as they left the [C]onvention [C]enter, and to proceed along Market Street, into the crowd of violent anti-Trump protesters." The Officers "actively prevented the . . . [A]ttendees from proceeding south . . . , away from the anti-Trump protesters, or from leaving the [C]onvention through alternative exits." The Officers "instructed other police officers" to direct the Attendees in the same manner. Many of the Attendees "were beaten, victimized by theft, and/or had objects such as bottles and eggs thrown at them" as a result.

Two Attendees – Hernandez and Haines-Scrodin – claim that San Jose police "directed [them] to walk through the anti-Trump protesters, rather than . . . allow[ing] [them] to turn south, in the direction of safety." "Soon after following the[se] directions . . . , [they] were struck repeatedly in their faces and heads by anti-Trump protester, Victor Gasca." "Several other anti-Trump protesters also battered Hernandez and Haines-Scrodin, while Gasca kept up his assault." As a result, "Hernandez suffered a broken nose [and several] abrasions," and "Haines-Scrodin . . . suffered [various] bodily injuries."

Another Attendee, I.P., claims he experienced similar violence due to the City Defendants' poorly conceived crowd-control plan. Just like Hernandez and Haines-Scrodin, he "exited the east-northeast exit of the . . . Convention Center, where a line of police officers prevented [him] from turning right, to safety" and instead "directed [him] to turn left, into the anti-Trump protesters." "I.P. was struck in the back of his head" by one protester and "tackled . . . to the ground" by another." "After being attacked, I.P. made his way [back] to [the] police skirmish line, and was only later allowed to cross the line to safety."

According to the Attendees, the Officers were clearly aware of the violence outside the Convention Center. "In fact, as early as [6 p.m.] the day of the Rally, the San Jose police warned all officers deployed around [the] Rally that assaults had already been reported outside the [Convention Center]." During the Rally, the Officers witnessed the violence firsthand, or were at least informed of it, but they did nothing.

San Jose Police officers on the scene "arrested only three individuals" during the Rally, "each of whom allegedly assaulted and/or battered police officers." They made "no

arrests at the Rally in connection with the dozens of similar criminal acts committed against [the Attendees]."

Result: Affirmance of U.S. District Court (Northern District of California) denial of qualified immunity to the officers.

CIVIL RIGHTS ACT CIVIL LIABILITY: PANEL VOTES 2-1 THAT SECOND AMENDMENT PROVIDES RIGHT TO OPENLY CARRY A HANDGUN IN PUBLIC

In Young v. State of Hawaii, ___ F.3d ___ , 2018 WL ___ (9th Cir., July 24, 2018), in a decision reported by a wide variety of media, a three-judge panel rules 2-1 that the Second Amendment of the U.S. Constitution provides a right to carry a firearm openly in public. A summary by staff of the Ninth Circuit summarizes the ruling as follows (the staff summary is not part of the Court's opinion):

> The panel reversed the [Hawaii] district court's dismissal of claims brought against the County of Hawaii, dismissed plaintiff's appeal as to the State of Hawaii, and remanded, in plaintiff's 42 U.S.C. § 1983 action alleging that the denial of his application for a handgun license violated his Second Amendment right to carry a loaded firearm in public for self defense. The County of Hawaii's Chief of Police denied plaintiff's application to carry a handgun because he failed to satisfy Hawaii's licensing requirements, as set forth in section 134-9 of the Hawaii Revised Statutes. Section 134-9 acts as a limited exception to the State of Hawaii's "Place[s] to Keep" statutes, which generally require that gun owners keep their firearms at their "place of business, residence, or sojourn." H.R.S. §§ 134-23, 134-24, 134-25.
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> The exception allows citizens to obtain a license to carry a loaded handgun in public, either concealed or openly, under certain circumstances. Plaintiff alleged that the County violated the Second Amendment by enforcing against him the State's limitations in section 134-9 on the open carry of firearms to those "engaged in the protection of life and property" and on the concealed carry of firearms to those who can demonstrate an "exceptional case."
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> The panel acknowledged that while the concealed carry of firearms categorically falls outside Second Amendment protection, see Peruta v. County of San Diego, 824 F.3d 919, 939 (2016) (en banc), it was satisfied that the Second Amendment encompasses a right to carry a firearm openly in public for self-defense. Analyzing the text of the Second Amendment and reviewing the relevant history, including founding-era treatises and nineteenth century case law, the panel stated that it was unpersuaded by the County's and the State's argument that the Second Amendment only has force within the home.
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> The panel stated that once identified as an individual right focused on self-defense, the right to bear arms must guarantee some right to self-defense in public. The panel held that because Hawaii law restricted plaintiff in exercising the right to carry a firearm openly, it burdened conduct protected by the Second Amendment.
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> In determining the appropriate level of scrutiny to apply to section 134-9, the panel first held that the right to carry a firearm openly for self-defense falls within the core of the Second Amendment. The panel stated that restricting open carry to those whose job

entails protecting life or property necessarily restricts open carry to a small and insulated subset of law-abiding citizens.

The panel reasoned that the typical, law-abiding citizen in the State of Hawaii was entirely foreclosed from exercising the core Second Amendment right to bear arms for self-defense. The panel concluded that Hawaii's limitation on the open carry of firearms to those "engaged in the protection of life and property" violated the core of the Second Amendment and was void under any level of scrutiny.

Dissenting, Judge Clifton stated the majority opinion disregarded the fact that states and territories in a variety of regions have long allowed for extensive regulations of and limitations on the public carry of firearms. Judge Clifton wrote that such regulations are presumptively lawful under District of Columbia v. Heller, 554 U.S. 570 (2008), and do not undercut the core of the Second Amendment. In addition, Judge Clifton stated that the majority opinion misconceived the intermediate scrutiny test, assumed without support in the record that Hawaii's statute operates as a complete ban, and substituted its own judgment about the efficacy of less restrictive regulatory schemes.

[Emphasis added; some paragraphing revised for readability]

Result: Reversal of Hawaii U.S. District Court's order dismissing plaintiff's Civil Rights Act lawsuit; remanded to District Court for further proceedings.

LEGAL UPDATE EDITOR'S NOTE: The State of Hawaii is likely to seek (and I think is likely to obtain) further review by a larger panel of Ninth Circuit judges.

LEGAL UPDATE EDITOR'S COMMENT: It is generally recognized that the Washington constitution, article I, section 24, provides a qualified right to openly carry a loaded firearm in public. In the interplay between the power to grant individual rights under state constitutions and the federal constitution, the Washington constitution lawfully may grant greater open-carry rights than does the Second Amendment.

CORRECTIONS CIVIL RIGHTS ACT CIVIL LIABILITY: COUNTY OF LOS ANGELES LOSES ON ISSUES RELATED TO SCREENING AND HANDLING MENTALLY ILL JAIL INMATES

In Shorter v. Baca, ___ F.3d ___ , 2018 WL ___ (9th Cir., July 16, 2018), a three-judge Ninth Circuit panel rules in favor of a jail inmate who sued Los Angeles County for (1) the method the Jail used to screen her and other potentially mentally ill detainees, (2) the ways in which the Jail handled exercise times for her as a mentally ill detainee, and (3) the ways in which Jail handled her as a non-compliant mentally ill detainee. Ninth Circuit staff summarizes the ruling as follows (the summary is not part of the Ninth Circuit opinion):

The panel vacated a partial grant of summary judgment, reversed the denial of a new trial, and remanded for further proceedings in a 42 U.S.C. § 1983 action brought by a pretrial detainee who alleged inadequate medical care, unconstitutional conditions of confinement, and humiliating and invasive strip searches.

The panel first noted that plaintiff presented uncontroverted evidence at trial that the County of Los Angeles, tasked with supervising high-observation housing for mentally ill women, has a policy of shackling the women to steel tables in the middle of an indoor

recreation room as their sole form of recreation, and that jail officials routinely left noncompliant detainees naked and chained to their cell doors, for hours at a time without access to food, water, or a toilet.

The panel held that given the evidence, the district court erred by instructing the jury to give deference to jail officials in deciding plaintiff's conditions of confinement and excessive search claims. The panel noted that the only justification that the County offered at trial for severely restricting plaintiff's conditions of confinement was a concern about overcrowding and understaffing in the facility. The panel held that if plaintiffs in § 1983 actions demonstrate that their conditions of confinement have been restricted solely because of overcrowding or understaffing, a deference instruction ordinarily should not be given.

Rather, a deference instruction may be given only when there is evidence that the treatment to which the plaintiff objects was provided pursuant to a security-based policy. Similarly, if plaintiffs demonstrate that they have been subjected to search procedures that are an unnecessary, unjustified, or an exaggerated response to concerns about jail safety, deference to jail officials is unwarranted.

Addressing plaintiff's misclassification claim, the panel held that the magistrate judge abused his discretion by denying plaintiff's motion for a new trial on her claim that she was placed in a more restrictive unit without sufficient due process.

Finally, the panel vacated the district court's summary judgment as to plaintiff's inadequate medical care claim, and remanded for further proceedings in light of the recent opinion in Gordon v. County of Orange, 888 F.3d 1118 (9th Cir. 2018). The panel noted that without the benefit of Gordon, the district court erroneously evaluated plaintiff's inadequate medical care claim under the Eighth Amendment's subjective deliberate indifference standard rather than the appropriate objective standard.

Result: Reversal of U.S. District Court (Central District of California) rulings of (1) partial summary judgment, and (2) denial of new trial.

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WASHINGTON STATE SUPREME COURT

STATUTE-BASED PETITION FOR RESTORATION OF FIREARM RIGHTS: 6-3 RULING AGREES WITH DIVISION TWO OF COURT OF APPEALS AND DISAGREES WITH PETITIONER AND DIVISION ONE IN HOLDING THAT ANY CONVICTION-FREE PERIOD OF FIVE CONSECUTIVE YEARS FOLLOWING SERVICE OF SENTENCE SATISFIES STATUTE THAT AUTHORIZES PETITION TO RESTORE RIGHT TO POSSESS FIREARMS

State v. Dennis, ___ Wn.2d ___ , 2018 WL ___ (Div. I, July 26, 2018)

RCW 9.41.040(4)(a) provides, in part:

> [I]f a person is prohibited from possession of a firearm [as a result of a conviction for a serious offense] and has not previously been convicted . . . of a sex offense prohibiting firearm ownership . . . and /or any felony defined under any law as a

> class A felony or with a maximum sentence of at least twenty years, or both, the individual may petition a court of record to have his or her right to possess a firearm restored:
>
> (i)(A) If the conviction . . . was for a felony offense, after five or more consecutive years in the community without being convicted ... or [being] currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525[.]

In 1991, Edgar Dennis III was convicted of second degree robbery, third degree assault, and two counts of felony violation of the Uniform Controlled Substances Act, chapter 69.50 RCW. His convictions disqualified him from possessing a firearm. Dennis was also convicted of third degree assault in 1998. After serving his sentence, he lived in the community for over 15 years without a conviction. Then, in 2014, he was convicted of first degree negligent driving, a misdemeanor under RCW 46.61.5249.

In 2016, he petitioned the King County Superior Court for restoration of his firearms rights. Based on his 2014 misdemeanor conviction, the Superior Court denied his petition. He appealed to Division One of the Court of Appeals. Division One agreed with the Superior Court and disagreed with the conflicting statutory interpretation of Division Two of the Court of Appeals in Payseno v. Kitsap County, 186 Wn. App. 465 (2015). Division One held that Dennis was not eligible to apply for restoration of his firearms rights because he had a misdemeanor conviction within the five-year period immediately preceding his application for restoration of rights.

Now, the Washington Supreme Court has ruled 6-3 that Division Two was correct. Both the majority and dissenting Supreme Court opinions in Dennis agree that the statute is not ambiguous, but they disagree as to the plain meaning of the statute in relation to the controversy before the Court. The Majority Opinion concludes:

> The language of the restoration provision is clear: an offender having previously been convicted of a class C felony needs a period of five years without any convictions before he or she can petition for restoration of rights; this five-year period need not immediately precede the petition. If the legislature intended the five-year period to immediately precede a petition for restoration, it could have said so, but where the legislature omits language from a statute, we may not read language into the statute.

[Citations omitted]

Result: Reversal of Court of Appeals decision that affirmed the King County Superior Court order denying the statute-based petition of Edgar Dennis, III, for restoration of firearms rights.

PROSECUTION MAY BE PURSUED UNDER RCW 9.41.040(1)(a) FOR UNLAWFUL POSSESSION OF FIREARM IN FIRST DEGREE: ALTHOUGH TRIAL COURT IN ORIGINAL 1994 SENTENCING FOR THE PREDICATE "SERIOUS OFFENSE" DID NOT ADVISE OF FIREARMS-RIGHTS-LOSS CONSEQUENCE OF CONVICTION, JUDGES IN SEVERAL SUBSEQUENT CASES ADVISED DEFENDANT THAT CONVICTIONS FOR NON-SERIOUS OFFENSES HAD THE GUN-BARRING CONSEQUENCE

State v. Garcia, ___ Wn.2d ___ , 2018 WL ___ (July 5, 2018)

Facts and Proceedings below:

Joaquin Garcia was convicted in 1994 of first degree rape of a child. That offense qualifies as a "serious offense" under RCW 9.41.040(1)(a) and RCW 9.41.010(23) which make subsequent possession of a firearm first degree unlawful possession of a firearm (UPFA). In 2014, Garcia was found by officers to be in possession of a firearm. He was charged with unlawful possession of a firearm (UPFA) in the first degree under RCW 9.41.040(1)(a). This appeal concerns that charge.

The State has conceded that it cannot prove that in sentencing for the 1994 conviction, Garcia was advised by the trial court, as required under RCW 9.41.047, orally and in writing of his ineligibility to possess firearms. Garcia committed and was convicted of several felonies after his 1994 conviction, including attempt to elude a police vehicle, rape of a child in the third degree, failure to register as a sex offender, assault in the third degree, and UPFA in the second degree. The record establishes that Garcia received formal written notice of his ineligibility to possess firearms after many of these post-1994 convictions.

Any of the post-1994 convictions, with the attendant firearm advisement required by RCW 9.41.047, could have supported a charge of second degree UPFA. However, Garcia's 1994 conviction is the only possible predicate offense that could support a conviction for first degree UPFA because none of his other felonies qualifies as a "serious offense" under chapter 9.41 RCW.

In this case, Garcia argued that he could not be convicted of UPFA in the first degree because he had not received the proper notice at the time of sentencing on his 1994 conviction. The State argued that Garcia had subsequently received adequate notice to satisfy the purpose of the notice statute at RCW 9.41.047.

The superior court dismissed the charge against Garcia for first degree UPFA. On appeal, Division One of the Court of Appeals reversed the dismissal and remanded the case for determination of whether notice had been given to the defendant. **LEGAL UPDATE EDITORIAL NOTE: It appears to me that the Supreme Court has decided on the merits that the evidence establishes that Garcia committed first degree unlawful possession of a firearm in the first degree, and that the trial court has no role to play on factual determination, but maybe the majority opinion does not mean what it appears to say in that regard.**

ISSUE AND RULING: May a person be convicted under RCW 9.41.040 for unlawful possession of firearm in the first degree, where, even though the trial court in the original sentencing for a "serious offense" (the predicate to charging UPFA in the first degree) did not advise the person of firearms-rights-loss consequences of the conviction, judges in several subsequent cases advised him that the subsequent convictions for non-serious offenses had the consequence of barring possession of a firearm? (ANSWER: Yes, rules a 6-3 majority)

Result: Affirmance of Court of Appeals decision that reversed the King County Superior Court dismissal of the charge against Joaquin David Garcia for first degree unlawful possession of a firearm; case remanded, apparently (see editorial note above) for entry of conviction for first degree UPFA.

ANALYSIS: (Excerpted from Supreme Court majority opinion)

RCW 9.41.047(1)(a) states:

> At the time a person is convicted . . . the convicting or committing court shall notify the person, orally and in writing, that the person must immediately surrender any concealed pistol license and that the person may not possess a firearm unless his or her right to do so is restored by a court of record.

RCW 9.41.047(1) does not expressly provide a remedy for a convicting court's failure to comply with its terms. However, because of the statute's constitutional underpinnings, this court fashioned a remedy for such a violation in State v. Minor, 162 Wn.2d 796 (2008). There, we reversed the defendant's conviction for unlawful possession of a firearm where the trial court failed to comply with the statutory notice requirement of RCW 9.41.047(1), holding, "The only remedy appropriate for the statutory violation is to reverse the current conviction."

We next considered a violation of RCW 9.41.047(1) in State v. Breitung, 173 Wn.2d 393 (2011) (Breitung II). There, the defendant was convicted of "domestic violence assault, making him ineligible to own firearms," but was not notified of his ineligibility to possess firearms by the convicting court. The defendant was subsequently convicted of second degree UPFA. This court affirmed the Court of Appeals, which held:

> "where a convicting court has failed to give the mandatory notice directed in RCW 9.41.047(1) and there is no evidence that the defendant has *otherwise acquired actual knowledge of the firearm possession prohibition that RCW9.41.047(1) is designed to impart,* the defendant's subsequent conviction for unlawful possession of a firearm is invalid and must be reversed."

Additionally, we stated that lack of notice must be established by the defendant as an affirmative defense. To rebut the defense, the court then placed the burden on the State to establish that the defendant had "otherwise acquired actual knowledge" of the firearm possession prohibition. Garcia argues that "otherwise acquired actual knowledge" is sufficient to support a charge of UPFA only if such knowledge is acquired "at the time of the underlying conviction." Because the defendant in Breitung did not possess "otherwise acquired actual knowledge," the court did not define "otherwise acquired actual knowledge" or decide whether such knowledge had to be obtained contemporaneously with the conviction, as required by the statute.

The State argues that failure to provide notice of a firearms prohibition at the time of the underlying conviction does not require dismissal per se. Instead, the State contends that it should have been able to present evidence of Garcia's subjective knowledge that he was prohibited from possessing firearms. Specifically, the State wished to present "evidence of Garcia's own admissions and actions showing longstanding actual knowledge," including "at least half a dozen formal advisements of his loss of firearm rights while being sentenced for his more-recent felonies." The State urges that "otherwise acquired actual knowledge" is any knowledge or understanding by the defendant that he is prohibited from possessing a firearm, regardless of the timing, nature, or source of that information.

. . . .

> RCW 9.41.047(1)'s mandate is clear that a convicting court must notify a defendant orally and in writing of a firearm prohibition. The legislature's intent was to ensure that a convicting court informs the defendant that by committing a crime, he or she has lost the constitutional right to bear arms. See Breitung II, 173 Wn.2d at 403 . . . .
>
> While this court has not had occasion to decide what evidence will satisfy *Breitung*'s "otherwise acquired actual knowledge" standard, the Court of Appeals has addressed this issue in State v. Carter, 127 Wn. App. 713 (2005). In Carter, the defendant was charged with UPFA but argued the charge should have been dismissed because he was not notified of his loss of firearm rights at the time of his predicate offense. The Court of Appeals affirmed the trial court's refusal to grant the defendant's motion, holding that the defendant had actual knowledge of the firearm prohibition because he was formally notified at the time of a felony conviction that occurred after the predicate offense but before the UPFA charge. We agree with Carter that "otherwise acquired actual knowledge" may be sufficient to overcome a failure to comply with RCW 9.4l.047(1)'s requirements when the defendant receives statutory notice following a subsequent conviction.
>
> Such after-acquired knowledge is the primary goal of notice required by RCW 9.41.047(1), thereby preserving a predicate offense for a UPFA charge. We hold that "otherwise acquired actual knowledge" need not be contemporaneous, but it must be consistent with the type of notice that RCW 9.41.047(1) is designed to provide defendants. Indeed, the Court of Appeals in Breitung I [155 Wn. App. 606 624, n. 11 (2010)] explained that "In this circumstance, the required notice imparts actual knowledge of the prohibition. . . . ."
>
> . . . .
>
> **Accordingly, information that is communicated by or derived from an authorized source, such as a judge, a probation officer, a member of the court staff, or defense counsel, even though later acquired, will meet the requirement of the statute.**
>
> Here, while Garcia was not notified of a firearm prohibition at the time of his 1994 conviction, he did receive formal notice at the time of his subsequent convictions. Because Garcia was formally notified by authorized persons during his subsequent convictions, he had "otherwise acquired actual knowledge" and his 1994 conviction constitutes a valid predicate offense.

[Emphasis added; some citations omitted, other citations revised for style]

Dissenting Opinion:

Justice Fairhurst authors a dissent that is joined by Justices Johnson and Gordon McLoud. She would apply RCW 9.41.047 strictly and would not allow prosecution for first degree UPFA under the circumstances of this case.

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WASHINGTON STATE COURT OF APPEALS

REASONABLE SUSPICION FOR TRAFFIC STOP: REQUIREMENT OF APPLYING FOR A CERTIFICATE OF TITLE WITHIN 15 DAYS OF DELIVERY OF A VEHICLE IS AN ACT REQUIRED UNDER RCW 46.12.650(5)(A), AND AN OFFICER MAY MAKE A STOP BASED ON REASONABLE SUSPICION THAT THIS TRAFFIC INFRACTION UNDER RCW 46.63.020 HAS BEEN COMMITTED

State v. Hendricks, ___ Wn. App.2d ___ , 2018 WL ___ (Div. II, July 3, 2018 order issued declaring the Court's April 24, 2018 unpublished opinion to be published)

Facts and Proceedings below:

A Clallam County Sheriff's deputy testified that he was on duty on the evening of September 7, 2016 when he saw a Mazda pickup truck and ran the license plate of the vehicle. Upon his check of the truck's license plate, the deputy learned that more than 15 days had passed since ownership of the vehicle had changed, but the title had not been transferred.

When the truck passed, the deputy also saw that the truck's back license plate was partially obscured by a trailer hitch. The deputy conducted a traffic stop of the truck. When the deputy made contact with the vehicle's occupants, he recognized Kymberlie Ciulla in the front passenger seat and Cade Hendricks in the back seat. The deputy had not recognized either of them before making the vehicle stop.

The deputy knew that Hendricks had an outstanding arrest warrant. He learned from dispatch that there was an active domestic violence no contact order restraining Hendricks from coming near or having contact with Kymberlie Ciulla. The deputy arrested Hendricks for violation of the no contact order.

Hendricks was charged with violation of the no contact order. He moved to suppress evidence of the deputy's observation during the stop. He argued that the deputy lacked authority to conduct a traffic stop based on his suspicion that the vehicle's title was not timely transferred or based on his suspicion that the vehicle's license plate was partially obscured.

The trial court denied his suppression motion and convicted him of violating the no-contact order. The trial court also found that the violation was committed against a family or household member.

ISSUE AND RULING ON APPEAL: The requirement of applying for a certificate of title within 15 days of delivery of a vehicle is an act required under RCW 46.12.650(5)(a). Is the failure to do so a "traffic infraction" under RCW 46.63.020 such that an officer may stop a vehicle based on reasonable suspicion that the infraction has been committed? (ANSWER BY COURT OF APPEALS: Yes)

LEGAL UPDATE EDITORIAL NOTE: The Hendricks Court also rules that the defendant's "pretext stop" argument fails because he failed to point to any evidence to support his argument. The record establishes that the stop was initiated based upon the deputy running license plates as vehicles passed him, and that the deputy did not recognize the vehicle's occupants until after initiating the traffic stop.

Result: Affirmance of Clallam County Superior Court conviction of Cade Grey Hendricks for violation of no contact order against a family or household member.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Under RCW 46.12.650(7), the failure to transfer title within 45 days of delivery of a vehicle constitutes a misdemeanor offense.
>
> Hendricks argues that the failure to comply with RCW 46.12.650(5)(a)'s requirement of transferring title within 15 days of delivery of a vehicle does not constitute a traffic infraction under RCW 46.63.020 because the failure to timely transfer title is not a "parking, standing, stopping, [or] pedestrian offense." In support of this argument, he contends that the legislature intended to limit the scope of traffic infractions to those associated with parking, standing, stopping, or pedestrian offenses under the principle of ejusdem generis. Hendricks's contention fails.
>
> A plain reading of RCW 46.63.020 reveals that the legislature intended to designate as a traffic infraction the failure to perform "any act required" under Title 46 RCW. The phrase "relating to traffic including parking, standing, stopping, and pedestrian offenses" modifies only "an equivalent administrative regulation or local law, ordinance, regulation, or resolution." RCW 46.63.020. Because the requirement of applying for a certificate of title within 15 days of delivery of a vehicle is an act required under RCW 46.12.650(5)(a), the failure to do so is a "traffic infraction" under RCW 46.63.020.
>
> The plain language of RCW 46.63.020 shows that the legislature intended to treat the failure to timely register a vehicle's title as a traffic infraction and, thus, the trial court correctly concluded that [the deputy] had an articulable suspicion justifying his stop of the vehicle in which Hendricks was riding as a passenger. Because this suspected traffic infraction alone justified [the deputy's] traffic stop, we need not address Hendricks's claim that [the deputy] lacked authority to stop the vehicle based on a partially obscured license plate.

[Footnotes omitted]

INSUFFICIENCY OF EVIDENCE: (1) ACCOMPLICE LIABILITY FOR CRIMINAL HOMICIDE CANNOT BE ESTABLISHED BY PROOF THAT DEFENDANT ARMED HIMSELF AND TOOK COVER IN SELF-DEFENSE; (2) DRIVE-BY SHOOTING CANNOT BE ESTABLISHED BY EVIDENCE THAT DEFENDANT TOOK SHOTS FROM BEHIND A CAR THAT HAD PARKED BEHIND THE CAR THAT TRANSPORTED HIM TO THE SCENE OF THE SHOOTING

In State v. Jameison, ___ Wn. App.2d ___ , 2018 WL ___ (Div. III, June 28, 2018), Division Three of the Court of Appeals rules against the State in holding that : (1) the defendant's self-defense actions of arming himself with a gun and taking cover behind a car near a dance club, after an argument among others arose shortly after 2 a.m., did not support charging him with *accomplice liability for criminal homicide* in a shooting death in the area, where the defendant's actions of arming himself and taking cover were triggered by seeing the eventual shooter angrily go to a nearby car, retrieve a gun and return to the club; and (2) the defendant could not be charged with *drive-by shooting* in light of, at the time of defendant's returning of shots toward the shooting-initiator, defendant was separated from his transportation car by an intervening car and a telephone pole.

1. *Analysis of insufficiency of evidence of accomplice liability to criminal homicide:*

The central question on accomplice liability turns on whether Jameison could be found to have "encouraged," within the meaning of the accomplice liability statute at RCW 9A.08.020, the shooting by Williams that inadvertently hit the victim, Eduardo Villagomez. On that question, the Jameison Court includes the following in its analysis:

> Lashawn Jameison never sought to assist Anthony Williams. He never directly encouraged Williams to shoot either himself or Kwame Bates. Williams wanted to shoot or wound Bates or Jameison. Jameison did not seek this goal. Jameison and Williams acted as antagonists. They entered any fight from opposite poles.
>
> . . . .
>
> This court, in State v. Parker, 60 Wn. App. 719 (1991), considered Robert Parker to have engaged in a venture with Keese and to be an active participant in the venture. The two engaged in a cat and mouse game [with their vehicles on a highway]. Keese testified [in the Parker case] that she would have slowed if Parker had decreased his speed [in the cat and mouse game with their vehicles].
>
> [In the Parker case] Robert Parker engaged in the unlawful behavior of reckless driving before the fatal accident. Jameison engaged in no unlawful behavior before Williams fired the bullet that killed Eduardo Villagomez. Jameison grabbed a gun that he owned legally. He stood his ground. The law did not compel him to leave the area of the Palomino Club. He fired only after Williams fired. Lashawn Jameison also never worked in tandem with Anthony Williams.

2. *Analysis of insufficiency of evidence of drive-by shooting*

RCW 9A.36.045(1) (with emphasis added) declares:

> A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge *is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter* or the firearm, or both, to the scene of the discharge.

In State v. Vasquez, 2 Wn. App. 2d 632 (Div. III, March 1, 2018), Division Three ruled that the facts of the case did not satisfy the close connection that is required between (1) a perpetrator and (2) a vehicle for a violation of the drive-by shooting statute, RCW 9A.35.045. In Vasquez, the perpetrator ran 63 feet from his vehicle and around the corner of a grocery store prior to shooting and killing the victim.

In Jameison, the Court of Appeals relies as follows on Vasquez and a Washington Supreme Court precedent to support the Court's conclusion that the drive-by statute does not apply to defendant Jameison's actions:

> [We wrote in State v. Vasquez] that the immediate area was either inside the vehicle or from within a few feet or yards of the vehicle. The crime of drive-by shooting contemplates a shooter who is either inside a vehicle or within easy or immediate reach

of the vehicle. Intervening obstacles disqualify a location from being within the immediate area.

In [State v. Rodgers, 145 Wn.2d 55 (2002)] the Supreme Court held two blocks did not fall within the immediate area. In State v. Vasquez, we held that a distance of sixty-three feet did not qualify as the immediate area. When Lashawn Jameison fired his responding shots, Jameison likely stood closer than sixty-three feet of the Toyota Camry, the car in which he traveled to the Palomino Club. We still hold that Jameison did not stand within the immediate area. The obstacle of an additional car and a telephone pole stood between Jameison and the Camry. The Camry was not within his immediate reach. Jameison stood more than a few feet or yards from the Camry.

We do not base our decision on the ground that the shooting lacked proximity in time to when Lashawn Jameison arrived in the Toyota Camry, but we note that Jameison had not recently ridden in the car. He had entered a club and partied in the intervening minutes.

Result: Affirmance of Spokane County Superior Court's dismissal of charges of murder, manslaughter and drive-by shooting. Due exclusively to a procedural matter, the Court of Appeals does not address all of the drive-by shooting charges, but the Court's decision appears to require that all of the drive-by shooting charges be dismissed.

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BRIEF NOTES REGARDING JULY 2018 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES

Under the Washington Court Rules, General Rule 14.1(a) provides: "Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."

Every month I will include a separate section that provides very brief issue-spotting notes regarding select categories of unpublished Court of Appeals decisions that month. I will include such decisions where issues relating to the following subject areas are addressed: (1) Arrest, Search and Seizure; (2) Interrogations and Confessions; (3) Implied Consent; and (4) possibly other issues of interest to law enforcement (though probably not sufficiency-of-evidence-to-convict issues).

In July 2018, eight unpublished Court of Appeals opinions fit these categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of case results.

1. State v. Eric Matthew Hopper: On July 2, 2018, Division One of the COA rules for the State in rejecting defendant's appeal from his King County Superior Court conviction for *commercial sexual abuse of a minor*. Hopper called and sent text messages to the number listed in a Backpage.com advertisement featuring a photograph of an unidentifiable female with the fictitious name of "Whisper." He ultimately paid to have sex with K.H., the 16-year-old girl

pictured in the ad. Although he believed that he was communicating with K.H. by text, he was actually communicating with her pimp, Allixzander Park. Hopper argued on appeal that Park violated the Washington Privacy Act (chapter 9.73 RCW) by "intercepting" his "private communications" to K.H. But the Court of Appeals rules that the circumstances show that **Hopper did not have a reasonable expectation of privacy in these text messages**. Thus, his text messages to K.H. were not "private communications." The Court of Appeals discusses four fact-based Washington Supreme Court decisions, two of which found communications to be private and two of which held communications to be not private. The Court of Appeals also includes the following footnote regarding Backpage:

> The Department of Justice seized Backpage.com in April 2018. Press Release, U.S. Dep't of Justice, Justice Department Leads Effort to Seize Backpage.Com, the Internet's Leading Forum for Prostitution Ads, and Obtains 93-Count Federal Indictment (April 9, 2018),https://www.justice.gov/opa/pr/justice-department-leads-effort-seize-backpagecom-internet-s-leading-forumprostitution-ads.

2. State v. Jesse Carl Frame: On July 10, 2018, Division Two of the COA rules for the State on the State's appeal from a Clark County Superior Court/Juvenile Court decision that granted the *petition of Mr. Frame to restore his right to own or possess a firearm*. The Court of Appeals rules that, under RCW 9.41.040(4)(1)(a), an unsealed prior juvenile court adjudication of first degree child molestation is the same as an adult court conviction of that crime in barring the previously adjudicated person from petitioning for restoration of firearm rights, and no exception applies in this case.

3. State v. Shane Lee Moy: On July 16, 2018, Division One of the COA rules for the State in rejecting defendant's appeal from his Snohomish County Superior Court conviction for *possession of a controlled substance (heroin) while on community custody*. The Court of Appeals rules that he record shows that after the police arrested the vehicle's driver, Moy, a passenger, was free to leave. But instead, he volunteered to drive the car away and gave a false identity to the police, which led to a determination of his identity and his arrest on an outstanding warrant. Accordingly, the Court of Appeals rules that the **passenger was not unlawfully seized at the point when his identity was discovered and the warrant arrest and search incident to arrest were made**.

Research Note: For discussion of restrictions on investigating passengers in vehicle stops, see pages 146-147 of the Washington-focused law enforcement and prosecutor guide on the Criminal Justice Training Commission's LED internet page: Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors, May 2015, b*y* Pamela B. Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys.

4. State v. Charles Marcelus Taylor: On July 23, 2018, Division One of the COA rules for the State in rejecting defendant's appeal *from his King County Superior Court conviction for attempting to elude a pursuing police vehicle*. The Court of Appeals rejects defendant's challenge to **corroboration of dog-tracking evidence** that led to his discovery about 400 yards from the eluding vehicle that he ditched (such evidence included the facts that: Taylor was a friend of the owner of the chased car; only 30 minutes had passed at the point of discovery of the hiding Mr. Taylor; and his clothing at the point of arrest matched that of the person seen running from the ditched car). The Court of Appeals also rejects Taylor's **Brady argument** regarding the fact that the agency using the tracking dog did not keep records of the dog's track record of accuracy (an officer testified that the dog had a 85 to 90% accuracy rate).

5. State v. Shaquille Capone Jones (DOB 2/25/1994): On July 23, 2018, Division One of the COA rules for the State in rejecting defendant's appeal from his Snohomish County Superior Court convictions for *three counts of first degree assault with a firearm; and one count each of unlawful possession of a firearm in the second degree, possession of a stolen firearm, and tampering with a witness*. The Court of Appeals rules that he Superior Court correctly denied motions to (1) suppress **identification evidence** based on photo lineups (ruling that the photos in the lineups were sufficiently similar in appearance); and (2) suppress evidence seized from a rental car (ruling that the warrant affidavit **established probable cause to believe that evidence related to a gun assault would be found in the rental car**).

Research Note: For discussion of the law relating to law enforcement eyewitness identification procedures, see the article on the Criminal Justice Training Commission's LED internet page: "Eyewitness Identification Procedures: Legal and Practical Aspects," by John Wasberg.

6. State v. Steven Vandesteeg: On July 23, 2018, Division One of the COA rules for the State in rejecting an appeal by the defendant from King County Superior Court convictions for *possessing a stolen vehicle and for attempting to elude a pursuing police vehicle*. The Court of Appeals finds fault in an officer's **identification procedure**, but the Court rules that the officer's identification testimony was reliable under the totality of the circumstances. The officer had chased an eluding vehicle, and the officer got a good look at the eluder at the point when the eluder got out of the stolen vehicle and faced the officer briefly before running away. Six weeks later, fingerprints from the stolen vehicle came back for Steven Vandesteeg. Instead of having another officer or officers set up a photo lineup, the officer himself obtained a photo of Vandesteeg in a database and determined that the photo matched the man he had seen at the scene of the crime. The Court of Appeals indicates that the officer's procedure was faulty but rules that his in-court identification was nonetheless reliable in light of (1) his excellent opportunity to view the suspect during the event, (2) his high degree of attention at the time, (3) the accuracy of the officer's original description, (4) his certainty in his identification, and (5) the length of time from the event and the photo identification. The first four factors worked in favor of reliability of the identification. The fifth factor worked against reliability because the six-week gap was relatively long.

7. State v. Alexander Sandoval-Ortiz: On July 30, 2018, Division One of the COA rules for the State in rejecting an appeal by the defendant from Snohomish County Superior Court convictions for *murder in the first degree, possession of a stolen firearm, and alien in possession of a firearm*. The Court of Appeals reviews a video-recorded interrogation and upholds that trial court's determination that Sandoval-Ortiz understood English well and thus (1) **was properly advised in English of his Miranda rights, and (2) was able to understand the questions that he was asked in English during the interrogation.**

8. In re Personal Restraint Petition of Casey Dullea Peppin: On July 31, 2018, Division Three of the COA denied the personal restraint petition of the Mr. Peppin in relation to his three Spokane County Superior Court convictions for *first degree possession of depictions of minors engaged in sexually explicit conduct*, but Division Three does grant him relief from some of his conditions of community custody. The Court of Appeals rules on his challenges to his convictions that he fails to support his contentions because the evidence shows that: (1) a **detective** who used special software **did not make intentional or reckless misstatements in an affidavit** for a search warrant for Mr. Peppin's computer; and (2) under the facts of this case, it would not have made a difference if Mr. Peppin's trial attorney had sought: (**a) a mirror image of Mr. Peppin's computer hard drive, or (b) the source code for the law enforcement software that the detective used**.

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

Beginning with the September 2015 issue, the most recent monthly Legal Update for Washington Law Enforcement is placed under the "LE Resources" link on the Internet Home Page of the Washington Association of Sheriffs and Police Chiefs. As new Legal Updates are issued, the current and three most recent Legal Updates will be accessible on the site. WASPC will drop the oldest each month as WASPC adds the most recent Legal Update.

In May of 2011, John Wasberg retired from the Washington State Attorney General's Office. For over 32 years immediately prior to that retirement date, as an Assistant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints and friendly differences regarding the approach of the LED going forward. Among other things, Mr. Wasberg prefers (1) a more expansive treatment of the core-area (e.g., arrest, search and seizure) law enforcement decisions with more cross references to other sources and past precedents and past LED treatment of these core-area cases; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law enforcement in Washington (though public disclosure decisions are unlikely to be addressed in depth in the Legal Update). For these reasons, starting with the January 2015 Legal Update, Mr. Wasberg has been presenting a monthly case law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

The Legal Update does not speak for any person other than Mr. Wasberg, nor does it speak for any agency. Officers are urged to discuss issues with their agencies' legal advisors and their local prosecutors. The Legal Update is published as a research source only and does not purport to furnish legal advice. Mr. Wasberg's email address is jrwasberg@comcast.net. His cell phone number is (206) 434-0200. The initial monthly Legal Update was issued for January 2015. Mr. Wasberg will electronically provide back issues on request.

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INTERNET ACCESS TO COURT RULES & DECISIONS, RCWS AND WAC RULES

The Washington Office of the Administrator for the Courts maintains a website with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/court_rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [http://www.supremecourt.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The internet address for the Criminal Justice Training Commission (CJTC) Law Enforcement Digest Online Training is [https://fortress.wa.gov/cjtc/www/led/ledpage.html].

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